90-1304

No. _____

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1990

ORLANDO CORIZ, JR., by and through
next friends ORLANDO CORIZ
and BERNICE D. CORIZ,

Petitioners,

v.

ARTHUR MARTINEZ and CARLOS GUILLEN,
in their individual capacities only,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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February 18, 1991

QUESTIONS PRESENTED

1. Where inadequacy of post-deprivation state remedy is an element of a Fourteenth Amendment procedural due process claim, should the first step of the Harlow v. Fitzgerald qualified immunity inquiry pertain to whether the constitutional right was "clearly established" by the federal "establishing case," or should this part of the inquiry be focused on adequacy of state remedy?

2. Under the second more fact-specific "application" step of Harlow ("contours" of the right "of which a reasonable person would have known"), which of the following divergent and conflicting standards from the various circuits should be the rule:

(a) strict factual correspondence

between the federal "establishing case" and the case at bar;

(b) application of the general legal principle to an analogous fact pattern; or should public officials be held to

(c) anticipate legal developments?

3. Once past the hurdles of (1) a "clearly established" general legal principle, and (2), e.g., of the three differing approaches to this second aspect of the Harlow test, a sufficiently analogous factual pattern, then is the "inadequacy of state remedy" element of the procedural due process claim subject to a higher burden of proof than "preponderance of the evidence," i.e., must this element be "clearly established" as a matter of proof?

4. Should the qualified immunity inquiry include reference to unreported United States district court memoranda and opinions, injecting a subjective element into Harlow, and requiring public officials to "know" the law via their "reasonably competent legal advisors," Garcia By Garcia v. Miera, when the law is not reported or indexed?

5. Since the "lower courts are not informed whether two conflicting opinions from different district courts [including the present intrajurisdictional conflict of two unreported District Court opinions], or even a split decision in the court of appeals, makes the law sufficiently unclear to mandate the granting of immunity," People of Three Mile Island, should such a split of

decisions be conclusive and binding on the Court with permanent, preclusive effect as to the constitutional right at issue?

6. Where petitioners are confronted with the New Mexico State Tort Claims Act, which insulates public school teachers from all tort liability including malicious acts, where a state Court of Appeals decision has already interpreted the Act as the sole avenue of any tort relief, does this "remedy," or the "remedy" of criminal action, subject to prosecutorial discretion where there is no compensation for damages, constitute a "meaningful opportunity to be heard," or is this inadequate post-deprivation state remedy for compensation?

7. Do the New Mexico State Tort Claims Act, as described in 6 above, where there is no compelling state interest necessitating the taking of fundamental constitutional rights, namely the Fourteenth Amendment property right to recover damages, and the right of access to the courts as protected by the First Amendment, the Fourteenth Amendment, and Article IV, Section 2, Clause 1 of the United States Constitution, and the District Court and Court of Appeals' decisions relegating petitioners to inadequate "state remedy" without recourse in federal court for violation of procedural due process violate the Equal Protection Clause of the Fourteenth Amendment?

8. Are the Fourteenth Amendment

property right to recover damages and the right to redress through access to the courts, as protected by the United States Constitution, Article IV, Section 2, Clause 1, the First Amendment, and the Fourteenth Amendment, Section 1, violated by the above-referenced New Mexico State Tort Claims Act and the decisions of the District Court and the Court of Appeals?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners, Orlando Coriz, Jr., by and through next friends Orlando Coriz and Bernice D. Coriz, respectfully pray that a writ of certiorari issue to review

the judgment and opinion of the Court of Appeals for the Tenth Circuit entered in the above-entitled proceeding on October 16, 1990 (Appendix A), as to which a timely motion for rehearing was denied on November 21, 1990. (Appendix B)

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit, to be reported in Federal Reporter, Second Series is attached hereto as Appendix A. The unreported opinion of the United States District Court for the District of New Mexico is attached hereto as Appendix C.

JURISDICTION

The dates of entry of the Tenth Circuit judgment and opinion, and the order denying petition for rehearing and

suggestion for rehearing en banc are, respectively, October 16, 1990 (Appendix A) and November 21, 1990. (Appendix B)

The statutory provision conferring jurisdiction on this Court to review the decision in question by writ of certiorari is 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article IV, Section 2, Clause 1, United States Constitution:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

First Amendment, United States Constitution

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment, Section 1
United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For

the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

New Mexico State Tort Claims Act
[Sections 41-4-1 through 41-4-27 NMSA 1978, relevant sections re-printed]

[Section] 41-4-2 A. [I]t is declared to be the public policy of New Mexico that governmental entities and public employees shall only be liable within the limitations of the Tort Claims Act...and in accordance with the principles established in that act.

***

[Section] 41-4-4 A. A governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort except as waived by Sections 41-4-5 through 41-4-12 NMSA 1978. Waiver of this immunity shall be limited to and governed by the provisions of Sections 41-4-13 through 41-4-25 NMSA 1978.

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[Sections] 41-4-5 through 41-4-12] [There is no waiver of immunity for Public Schools or Public School Teachers, as with, e.g., 41-4-10 Health Care

> Providers, and 41-4-12 Law Enforcement Officers.]
>
> ***
>
> [Section] 41-4-17 A. Exclusiveness of remedy.[1] The Tort Claims Act...shall be the exclusive remedy against a governmental entity or public employee for any tort for which immunity has been waived under the Tort Claims Act and no other claim, civil action or proceeding for damages, by reason of the same occurrence, may be brought against a governmental entity or against the public employee or his estate whose act or omission gave rise to the suit or claim.

STATEMENT OF THE CASE

In October, 1987, defendants-respondents Arthur Martinez (a gym teacher) and Carlos Guillen (a teacher's aide) at Espanola Valley High School, a

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[1] See also Gallegos v. State, 107 N.M. 349, 352, 758 P.2d 299 (1988): "Since the Act provides the exclusive remedy, to allow plaintiff to assert a claim outside the Act would render the Act meaningless."

public high school in New Mexico, used excessive force in discipline on plaintiff-petitioner Orlando Coriz, Jr. who was thrown to the gym floor ard suffered a broken arm, for not running laps. Orlando Coriz, Jr., by and through his parents and next friends, Orlando Coriz and Bernice D. Coriz, petitioners, filed suit August 18, 1988, in federal District Court under 42 U.S.C. Section 1983, for violation of Orlando Jr.'s Fourteenth Amendment substantive and procedural due process rights. Jurisdiction of the District Court was predicated upon 28 U.S.C. Sections 1331 and 1343, and 42 U.S.C. Section 1983. Defendants Martinez and Guillen were sued in their individual capacities, acting under color of state law.

The claims were premised upon the

constitutional rights established in Garcia By Garcia v. Miera, 817 F.2d 650 (10th Cir. 1987), rehearing and rehearing en banc denied (1988), cert. denied, 108 S.Ct. 1220 (1988), which federal "establishing case"[2] was received in the New Mexico State Supreme Court Library on June 23, 1987. (Appendix H) The legal principle in Garcia By Garcia establishes

> three categories of corporal punishment. Punishments that do not exceed the traditional common law standard of reasonableness are not

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[2] It is noted that the Fifth Circuit conflicts with the Tenth Circuit and several other circuits regarding these rights. There is no judicially cognizable Liberty Interest for public school children in the Fifth Circuit. See discussion criticizing this constitutionally disparate treatment of children in A Study In Irrationality: Refusal To Grant Substantive Due Process Protection Against Excessive Corporal Punishment In The Public Schools, Rosenberg, 27 Houston Law Review 399 (May 1990).

> actionable; punishments that exceed the common law standard without adequate state remedies violate procedural due process rights; and finally, punishments that are so grossly excessive as to be shocking to the conscience violate substantive due process rights, without regard to the adequacy of state remedies.***Thus, if the state were to provide no adequate remedy to deter this [mid-level] degree of [excessive] conduct and compensate the victim of that misconduct, we would find a violation of procedural due process.

Garcia By Garcia, supra, 817 F.2d at p. 656.

The District Court granted defendants-respondents' motion for summary judgment on the mid-tier procedural due process claim which was based upon allegations of excessive force and injury without adequate post-deprivation state tort remedy for compensation in New Mexico. (Appendix C)

The District Court decided that inadequacy of state remedy was not "clearly established," because of two conflicting, unreported, unindexed United States District Court memoranda and opinions in the District of New Mexico (Appendix F and Appendix G) on the issue of adequacy of state remedy.

Petitioners' request to the District Court for certification of interlocutory appeal was denied on this qualified immunity issue. (Appendix D) The case proceeded to jury trial on the higher, substantive due process ("shocking to the conscience") standard, which claim was lost. (Appendix E)

Thereafter, on December 14, 1989, petitioners timely appealed the procedural due process qualified immunity issue to the Court of Appeals for the

Tenth Circuit. On October 16, 1990, the Tenth Circuit affirmed the District Court (Appendix A), and denied petition for rehearing and suggestion for rehearing en banc on November 21, 1990. (Appendix B)

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH OTHER CIRCUITS AND WITH THE UNITED STATES SUPREME COURT.

A. THE FIRST PART OF THE HARLOW v. FITZGERALD 457 U.S. 800 (1982) QUALIFIED IMMUNITY DEFENSE, ASCERTAINMENT OF THE "CLEARLY ESTABLISHED" CONSTITUTIONAL RIGHT SET BY THE FEDERAL "ESTABLISHING CASE," HAS BEEN CHANGED BY THE TENTH CIRCUIT, AND

B. THE SECOND PART OF THE HARLOW QUALIFIED IMMUNITY DEFENSE, THE MORE FACT-SPECIFIC "APPLICATION" OF THE "CLEARLY ESTABLISHED" CONSTITUTIONAL RIGHT "OF WHICH A REASONABLE PERSON WOULD HAVE KNOWN," HAS BEEN DROPPED BY THE TENTH CIRCUIT.

There are two parts to Harlow's objective qualified immunity defense:

> [1] conduct [which] does not violate clearly established... constitutional rights,
>
> [2] of which a reasonable person would have known.

Harlow, supra, at p. 818.

First, it must be ascertained whether there was a "clearly established" constitutional right set by the federal "establishing case"[3] at the time of the

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[3] See: Comment, Harlow v. Fitzgerald: The Lower Courts Implement The New Standard For Qualified Immunity Under Section 1983, 132 U.Pa.L.Rev. 901, 923 (1984) ("correspondence between the facts of the 'establishing' case and the facts of the case under consideration," emphasis supplied); Stoneking v. Bradford Area School Dist., 882 F.2d 720, 726 (3rd Cir. 1989) ("[W]e reiterate the conclusion we reached in Stoneking I that the constitutional right Stoneking alleges, to freedom from invasion of her personal security...[,] was well established at the time the assaults upon her occurred."); Procunier v. Navarette,

alleged wrongdoing, then, secondly, the district court must make a "subsequent determination",[4] by a more "fact-specific" inquiry whether, as a "matter of law," the facts of the "establishing case" are sufficiently close to the case at bar so as to impute knowledge of the constitutional right to the public employee via his "reasonably competent

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434 U.S. 555,565 (1978) (It is the "constitutional right" which is subject to the clearly established inquiry); and Anderson v. Creighton, 483 U.S. 635, 641 (1978) (The "clearly established" inquiry pertains to "clearly established [legal] principles").

[4] Qualified immunity "requires us to undertake 'an inquiry into the general legal principles governing analogous factual situations, if any, and a subsequent determination whether the official should have related this established law to the instant situation' [citation omitted]." (Emphasis supplied.) Stoneking (II), supra, at p. 726.

legal advisor."[5]

Garcia By Garcia, supra, is the "establishing case" in the case at bar which clearly enunciated the "legal right" (see text, supra) prior to the incident in question (see Appendix C as to timing of the reported decision). The Garcia By Garcia court used the terms "inadequate" state remedy to "compensate," which triggers the procedural due process violation. Garcia By Garcia did not hold that it had to be clearly established that the state remedy was inadequate, nor did it hold that state remedy must be entirely impossible,

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[5] "We think a reasonably competent legal advisor to a school district should have realized that egregious invasions of a student's personal security would be unconstitutional." Garcia By Garcia, supra, 817 F.2d at p. 658. "[S]ubjective beliefs...are irrelevant." Anderson, supra, at p. 642.

merely "inadequate" remedy for "compensation." Although petitioners argue that there is no state remedy whatsoever, "[a]n [in]adequate remedy at law is one which is [not] clear, complete...[or] practical and efficient to the ends of justice and its prompt administration...." Cross Wood Products, Inc. v. Suter, 422 N.E. 2d 953, 957 (Ill. App. 1981). See also discussion infra, II-4.

Step two of Harlow is not the "clearly established" aspect of the inquiry. Step two involves application of the legal right by one of three different and conflicting tests that have developed within the various circuits: (1) strict factual correspondence between the federal "establishing case" and the instant case, (2) application of the

general legal principle to an analogous fact pattern, or (3) the requirement that public officials anticipate legal developments. See Comment, Harlow v. Fitzgerald: The Lower Courts Implement the New Standard For Qualified Immunity Under Section 1983, 132 U.Pa.L.Rev. 901, 923 (1984), and footnote 7 infra.

In the present case, the Tenth Circuit has dropped the second part of Harlow's test. The Tenth Circuit has now collapsed the two inquiries into one "clearly established" probe,[6] which

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[6] "Coriz has failed to show that it was clearly established that New Mexico did not provide an adequate post-deprivation remedy." (Appendix A, p. 3) "Because of the uncertain state of the law, the defendants' 'actions could reasonably have been thought consistent with the right they are alleged to have violated.'" (Appendix A, p. 4) The Tenth Circuit did not aim the "clearly established" inquiry at the Garcia By Garcia "establishing case" at all, nor

result conflicts with the Supreme Court's decision in Harlow and the various other circuits[7] which have adopted at least one of three standards at this second stage of establishing qualified immunity, which differing standards should be reconciled by the Supreme Court, because "[t]he approach a court chooses may be [unfairly and unevenly] dispositive of the plaintiff's section 1983 claim"

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did it take the "application of the general legal principle" step enunciated in Harlow and the other authorities cited herein. The Tenth Circuit carried over the "clearly established right" inquiry to the second inquiry, which is subject to one of the three varying standards as set forth in the text above.

[7] Circuits include the Second, Third, Fifth, Ninth, and the Eleventh which have applied one of the three standards set forth above. See Comment, Harlow v. Fitzgerald: The Lower Courts Implement The New Standard For Qualified Immunity Under Section 1983, 132 U.Pa.L.Rev. 901, 923-32 (1984), and authorities cited therein.

depending, arbitrarily, upon the circuit within which the injured party may reside. See Comment, Harlow v. Fitzgerald: The Lower Courts Implement The New Standard For Qualified Immunity Under Section 1983, 132 U.Pa.L.Rev. 901, 923 (1984).

II. THE TENTH CIRCUIT HAS DECIDED FIVE IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT:

1. WHICH OF THE CONFLICTING STANDARDS AMONG THE CIRCUITS SHOULD BE THE RULE WHEN APPLYING THE SECOND PART OF THE HARLOW QUALIFIED IMMUNITY DEFENSE?

See discussion in I, supra. Moreover, application of the constitutional right/federal "establishing case" to the facts of a presenting case may come out differently in four possible ways now, including the Tenth Circuit's one-step approach. The

disparate and confusing result stems from the Supreme Court's earlier abstention[8] in Harlow, which may have been valid at the time, but now calls for clarification of the law and unification of the circuits that have, subsequent to Harlow, come up with disparate standards in applying Harlow, where the approach may be dispositive of underlying constitutional rights and the degree of immunity afforded to public employees.

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[8] "Harlow did not attempt to resolve...the most difficult question that is faced by a court attempting to apply the redefined qualified immunity standard: the extent to which courts should require a correspondence between the facts of 'establishing' cases and the facts of a case under consideration." Comment, Harlow v. Fitzgerald: The Lower Courts Implement The New Standard For Qualified Immunity Under Section 1983; 132 U.Pa.L.Rev. 901, 923 (1984). Cf. People Of Three Mile Island v. Nuclear Reg. Com'rs., 747 F.2d 139, 144 (3rd Cir. 1984)

2. DO INTRAJURISDICTIONAL (OR INTERJURISDICTIONAL) CONFLICTS CONCLUSIVELY ESTABLISH THAT THE LAW IS NOT "CLEARLY ESTABLISHED" UNDER THE HARLOW QUALIFIED IMMUNITY DEFENSE?

The Tenth Circuit's opinion (Appendix A, p. 3, fn. 2) finds that "[t]he Garcia rule only applies to interjurisdictional conflicts [, and w]hen there is conflict within a jurisdiction, it cannot be doubted that the law there is not clearly established." This is an incorrect extrapolation from Garcia By Garcia. Garcia By Garcia, supra, 817 F.2d at p. 658, only decided that conflicts, whether inter- or intrajurisdictional, are "relevant but not controlling" to the Harlow inquiry. The Tenth Circuit has incorrectly filled the gap left by this

Supreme Court in Harlow,[9] which will undoubtedly lead to further conflict and confusion within the circuits.

The present case is a ripe and cogent example for the Supreme Court to define the circumstances under which the "state of the law" is to be evaluated, particularly as presents with the

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[9] "[W]e need not define here the circumstances under which 'the state of the law' should be 'evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court.'" Harlow, supra at p. 818, fn. 32.

"Unfortunately Harlow declined to define how...[the law] should be evaluated in determining what is clearly established...[legal principle, so a]s a consequence, 'lower courts are not informed whether two conflicting opinions from different district courts, or even a split decision in the court of appeals, makes the law sufficiently unclear to mandate the granting of immunity.'" (Emphasis supplied.) Garcia By Garcia, supra, 817 F.2d at p. 658, fn. 11

untoward, locked-in[10] result in the Tenth Circuit, in denigration of the constitutional right at issue, and with the dangerous precedent of imposing, in all public liability/civil rights cases, a gargantuan duty on public officials to objectively "know" the law through their reasonably competent legal advisors,[11] when the law is not reported or indexed, and where the Tenth Circuit's opinion

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[10] "Both courts and commentators have worried that the clearly established test will give officials 'one liability-free violation' of the Constitution....[citations omitted]. But if courts cannot prospectively articulate constitutional standards [as occurs in the instant case], there looms the even more unpalatable possibility of multiple bites of a constitutionally forbidden fruit. This is especially true in the present factual context...[of] excessive corporal punishment...." Garcia By Garcia, supra, 817 F.2d at pp. 656-7, fn. 8.

[11] See fn. 5, supra.

contributes to disparity and conflict among the circuits on analogous interjurisdictional conflicts.[12]

3. SHOULD PUBLIC OFFICIALS BE HELD TO OBJECTIVELY "KNOW" UNREPORTED AND UNINDEXED UNITED STATES DISTRICT COURT MEMORANDA AND OPINIONS VIA THEIR "REASONABLY COMPETENT LEGAL ADVISOR" IN THE HARLOW "STATE OF THE LAW" OR "CLEARLY ESTABLISHED" INQUIRY?

No. See discussion and citations and footnotes 5 and 11 referenced in II-2, supra.

4. WHAT CONSTITUTES A "MEANINGFUL OPPORTUNITY TO BE HEARD" SO AS TO SATISFY FOURTEENTH AMENDMENT PROCEDURAL DUE PROCESS WITHIN THE "ADEQUACY OF POST-DEPRIVATION STATE TORT REMEDY/ VIOLATION OF PROCEDURAL DUE PROCESS" CONTEXT?

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[12] "The circuits disagree as to whether inter-circuit conflict on a point of law negates the clearly established nature of a right." Lum v. Jensen, 876 F.2d 1385, 1389 (9th Cir. 1989).

Where issues of state governmental immunity exist, there is no clear, complete, practical and efficient entitlement to damages; the legal remedy is uncertain and inadequate. See Bio-Medical Laboratories, Inc. v. Trainor, 370 N.E. 2d 223, 227 (Ill. 1977), Cross Wood Products, Inc., supra, Logan v. Zimmerman Brush Co., 455 U.S. 422, 429 fn. 5 (1982) ("meaningful" post-deprivation state remedy is required in order to satisfy procedure due process), and Mullane v. Central Hanover Bank & Trust Co., 399 U.S. 306 (1950).

The above authorities should be applied to the New Mexico State Tort Claims Act which does not afford an adequate or meaningful opportunity to be heard or to obtain compensation. See description of the New Mexico State Tort

Claims Act in issues 6 and 7 of Questions Presented, and relevant excerpts from the New Mexico State Tort Claims Act in this petition. Because teachers are absolutely immune from any tort claim in New Mexico,[13] petitioners do not have adequate state remedy for compensation.

5. DO THE NEW MEXICO STATE TORT CLAIMS ACT AND THE DECISIONS OF THE DISTRICT COURT AND THE TENTH CIRCUIT DEPRIVE PETITIONERS OF EQUAL PROTECTION AND THEIR CONSTITUTIONALLY PROTECTED PROPERTY RIGHTS, AND THEIR RIGHT TO REDRESS THROUGH ACCESS TO THE COURTS?

Under the "strict scrutiny" test, San Antonio School District v. Rodriguez,

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[13] See also "Exclusiveness of Remedy" provision in the New Mexico Tort Claims Act, together with the New Mexico Court of Appeals decision in Gallegos, supra, 107 N.M. at p. 352, which holds that the Act provides the exclusive remedy for all tort claims against state employees. See fn. 1, supra.

411 U.S. 1,33 (1973), the "fair and substantial relation" test, Plyler v. Doe, 457 U.S. 202, 220 (1981), Trimble v. Gordon, 430 U.S. 762 (1977), Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 317 (1976) (Marshall, J., dissenting), and the "rational relation" test, Williamson v. Lee Optical Of Oklahoma, 348 U.S. 483, 486 (1955), petitioners have been denied equal protection of the laws as protected by the Equal Protection Clause of the Fourteenth Amendment.

The New Mexico State Tort Claims Act, insofar as it bars all tort claims against public school teachers, arbitrarily, without rational or compelling state interest, by not enacting some provision for waiver of sovereign immunity as it has with other

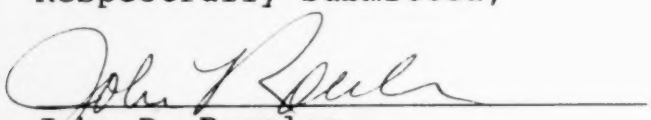
groups of similarly situated public employees, insofar as the Act provides in its "Exclusiveness of Remedy" clause that it is the sole avenue of any tort relief against public employees, insofar as Gallegos, supra, has additionally interpreted the Act as the sole means of bringing any tort claim against a public employee, and the decisions of the District Court and Tenth Circuit relegate petitioners to this inadequate "state remedy" without an avenue of relief in federal court for violation of procedural due process, constitute a de facto deprivation of two very substantial, fundamental constitutional rights: (1) the right to redress by access to the courts, as protected by Article IV, Section 2, Clause 1 of the United States Constitution, the First Amendment, and

Section 1 of the Fourteenth Amendment (see Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983)); and (2) the Fourteenth Amendment property interest in compensation for damages (see Board Of Regents v. Roth, 408 U.S. 564 (1972), Mullane, supra, and Martinez v. California, 444 U.S. 277 (1980)).

CONCLUSION

For the above-stated reasons, this petition for writ of certiorari should be granted, particularly to clarify the now four divergent standards for applying the Harlow qualified immunity defense, which difference affects substantive and procedural rights of claimants as well as the degree of immunity afforded to public employees.

Respectfully submitted,



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Counsel for Petitioners

February 18, 1991

APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit
OCT 10 1990
ROBERT L. HOECKER
Clerk

PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ORLANDO CORIZ, JR., by and through next friends ORLANDO CORIZ and BERNICE D. CORIZ, No. 89-2313

Plaintiffs-Appellants,

v.

ARTHUR MARTINEZ and CARLOS GUILLEN, in their individual capacities only,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. NO. 88-0979M)

John B. Roesler, Smith & Roesler, P.C., Santa Fe, New Mexico, Attorney for Plaintiffs-Appellants.

Daniel H. Friedman, Simons, Cuddy & Friedman, Santa Fe, New Mexico, Attorney for Defendants-Appellees.

Before **ANDERSON**, **BARRETT**, Circuit Judge, and **CHRISTENSEN**,* District Judge.

ANDERSON, Circuit Judge.

Plaintiff-appellant Orlando Coriz Jr. appeals a summary judgment entered against him on his procedural due process claim on the grounds that the defendants were qualifiedly immune. We affirm.

In the fall of 1987, defendant Guillen, an aide to defendant Martinez, a gym teacher at Espanola Valley High School, threw Coriz to the floor in an effort to maintain discipline. Coriz suffered a broken arm and filed suit under 42 U.S.C. Section 1983, alleging, inter alia, that his right to procedural due process had been violated because he

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* The Honorable A. Sherman Christensen, Senior Judge, United States District Court for the District of Utah, sitting by designation.

had no adequate post-deprivation remedy.[1] The district court granted defendants' motion for summary judgment on this

---

[1] Coriz's substantive due process and other claims were tried to a jury, which found against him.

The defendants contend that the adverse verdict on the substantive due process claim "moots" Coriz's procedural due process claim. We disagree. There are

> three categories of corporal punishment. Punishments that do not exceed the traditional common law standard of reasonableness are not actionable; punishments that exceed the common law standard without adequate state remedies violate procedural due process rights; and, finally, punishments that are so grossly excessive as to be shocking to the conscience violate substantive due process rights, without regard to the adequacy of state remedies.

Garcia by Garcia v. Miera, 817 F.2d 650, 656 (10th Cir. 1987), cert. denied, 485 U.S. 959 (1988). The jury's decision that the punishment in this case did not reach the third level in no way foreclosed a finding that the punishment reached the second level.

claim, finding that they were qualifiedly immune because the inadequacy of Coriz's post-deprivation remedy was not clearly established.

In a situation such as this, "where the State is truly unable to anticipate and prevent a random deprivation of a liberty interest," Zinermon v. Burch, 110 S. Ct. 975, 987 (1990), "postdeprivation tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide," id. at 985. "[A]n unauthorized intentional deprivation. . .by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available." Hudson v. Palmer, 468 U.S. 517, 533

(1984).

"[G]overnment officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). "[O]nce a defendant raises a qualified immunity defense the plaintiff assumes the burden of showing that the defendant has violated clearly established law." Hannula v. City of Lakewood, 907 F.2d 129, 131 (10th Cir. 1990).

Coriz has failed to show that it was clearly established that New Mexico did not provide an adequate post-deprivation remedy. As this court noted in Garcia by

Garcia v. Miera, 817 F.2d 650, 656 (10th Cir. 1987), cert. denied, 485 U.S. 959 (1988), federal judges in New Mexico had split on the question of whether the state provided adequate post-deprivation remedies for students whose procedural due process rights were allegedly violated by excessive punishment.[2]

Coriz argues that the Harlow inquiry into whether the law was clearly established should apply only to the defendants' acts, not to the adequacy of

---

[2] Coriz, quoting our statement in Garcia that "conflict is relevant to the Harlow inquiry, but not controlling," 817 F.2d at 658, contends that the district erred by relying solely upon this split within New Mexico in concluding that the law was not clearly established. The Garcia rule only applies to interjurisdictional conflicts. See Lum v. Jensen, 876 F.2d 1385, 1389 (9th Cir. 1989), cert. denied, 110 S. Ct. 867 (1990). When there is conflict within a jurisdiction, it cannot be doubted that the law there is not clearly established.

the remedies available to redress those acts. We concede that this is an unusual application of qualified immunity, but we conclude that the district court applied the law correctly.[3] The right Coriz claims the defendants violated is not simply to be free from random, unauthorized deprivations of liberty, but to be free from such deprivations in the absence of adequate post-deprivation remedies. See Paratt v. Taylor, 451 U.S. 527, 537 (1981) ("Nothing in [the Fourteenth] Amendment protects against all deprivations of life, liberty or property by the State. The Fourteenth

---

[3] The district court also could have certified to the New Mexico Supreme Court the question of whether Coriz had a state-law remedy. If the answer was affirmative, Coriz's claim would fail, for the absence of an adequate post-deprivation remedy is an element of his claim.

Amendment protects only against deprivations 'without due process of law.'"); see also Hudson v. Palmer, 468 U.S. at 533 ("the state's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy"). Because of the uncertain state of the law, the defendants' "actions could reasonably have been thought consistent with the right[] they are alleged to have violated." Anderson v. Creighton, 483 U.S. 635, 638 (1987).

The judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ORLANDO CORIZ, JR., by and through next friends; ORLANDO CORIZ; and BERNICE D.CORIZ

No. 89-2313

Plaintiffs-Appellants,

v.

ARTHUR MARTINEZ and CARLOS GUILLEN, in their individual capacities only,

Defendants-Appellees.

ORDER

Filed November 21, 1990

Before HOLLOWAY, Chief Judge, BARRETT, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges, and CHIRSTENSEN,* District Judge.

---

*The Honorable A. Sherman Christensen, Senior Judge, United States District Court for the District of Utah, sitting by designation.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the

suggestion for rehearing en banc is denied.

Entered for the Court

/s/
ROBERT L. HOECKER, Clerk

APPENDIX C

FILED
UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO
DEC 1 : 1988
CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

ORLANDO CORIZ, JR., by and through next friends ORLANDO CORIZ and BERNICE CORIZ,

Plaintiffs,

v.

ARTHUR MARTINEZ and CARLOS GUILLEN, in their individual capacities only,

Defendants.

No. 88-979-M
Civil

Entered on Docket
12/16/88

MEMORANDUM OPINION AND ORDER

This matter came on for consideration on defendants' motion to dismiss and for partial summary judgment. Having considered the motion, the response, and reply, and being otherwise fully advised in the premises, I find

that the motion is well taken in part and it will be granted in part and denied in part.

Background

This is a civil rights action in which the plaintiff claims that while he was a student at Espanola High School, a teacher, defendant Martinez, deputized a student, defendant Guillen, to act as Martinez' teacher's aide and that Martinez instructed and authorized Guillen to "use any kind of force including beating up the students in Martinez' gym class if they did not behave or do what they were told." Plaintiff alleges that pursuant to this authorization, Guillen used excessive force in uplifting plaintiff and slamming him down thereby breaking plaintiff's arm. Plaintiff claims that such conduct

violated his substantive due process and his procedural due process rights as protected by the Fourteenth Amendment.

Defendants' Motion to Dismiss Defendant Martinez

Defendants' motion to dismiss defendant Martinez is not well taken and it will be denied.

Qualified Immunity

Plaintiff's complaint alleges that defendants' conduct violated his procedural due process rights because no adequate post-deprivation remedy exists in New Mexico. Defendants move for summary judgment claiming that they are entitled to qualified immunity on this issue because the law of this District is not clearly established as to whether New Mexico provides adequate post-deprivation remedies to satisfy procedural due

process requirements. The doctrine of qualified immunity provides that "government officials performing discretionary functions, [sic] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." **Harlow v. Fitzgerald**, 457 U.S. 800, 818 (1982).

Although corporal punishment in public schools implicates a liberty interest, pre-deprivation notice and hearing are necessary only when state post-deprivation remedies are inadequate. **See Ingraham v. Wright**, 430 U.S. 651 (1977). The sole question presented to me on the issue of qualified immunity, therefore, is whether at the time of the

alleged violation an objective school official could determine whether New Mexico provided adequate post-deprivation remedies such that pre-deprivation due process was not required. See Harlow, 457 U.S. at 818.

In Garcia v. Miera, No. 83-0919-C slip op. at 10 (D.N.M. Apr. 4, 1985), reversed on other grounds 817 F.2d 650 (10th Cir. 1982), cert. denied 108 S.Ct. 1220 (1988), the court concluded that New Mexico provides adequate common law remedies to afford the plaintiff procedural due process. Just two months later in McGinness v. Cochran, No. 85-261-M, slip op. at 6 (D.N.M. June 3, 1985), I concluded that New Mexico failed to provide adequate remedies. The Tenth Circuit in Garcia v. Miera, 817 F.2d 650, 656 (10th Cir. 1987) cert. denied 108

S.Ct. 1220 (1988) noted the conflict between these opinions but found that it was unnecessary for them to reach that issue. These facts clearly indicate to me that at the time of the violation a conflict existed in the District of New Mexico as to whether New Mexico afforded sufficient post-deprivation remedies. Accordingly, defendants Martinez and Guillen are entitled to the qualified immunity defense and summary judgment is granted in favor of the defendants on this issue.

IT IS SO ORDERED.

/s/ E. L. Mechem
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FILED
AT ALBUQUERQUE
JAN 4 1989
JESSE CASAUS
CLERK
ENTERED ON DOCKET
01-04-89

ORLANDO CORIZ, JR., by and through next friends ORLANDO CORIZ and BERNIC D. CORIZ,

Plaintiff,

v. No. 88-979-M Civil

ARTHUR MARTINEZ and CARLOS GUILLEN, in their individual capacities only,

Defendants.

O R D E R

This matter came on for consideration on plaintiff's motion to reconsider my memorandum opinion and order of December 16, 1988 or in the alternative for certification for interlocutory appeal. Having considered the motion and being otherwise fully advised in the premises, I find that the

motion is not well taken and it will be denied.

IT IS SO ORDERED.

/s/ E. L. Mechem
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX E

FILED
AT ALBUQUERQUE
NOV 15 1989
JESSE CASAUS
CLERK

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

ENTERED ON DOCKET
11-15-89

ORLANDO CORIZ, JR., by and through next friends ORLANDO CORIZ and BERNICE D. CORIZ,

Plaintiffs,

v.

Case No: 88-979-M Civil

ARTHUR MARTINEZ and CARLOS GUILLEN, in their individual capacities only,

Defendants.

X Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict on November 8, 1989.

___ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiffs, Orlando Coriz, Jr., by and through next friends Orlando Coriz and Bernice D. Coriz, take nothing, that the

action be dismissed on the merits, and that the defendants Arthur Martinez and Carlos Guillen recover of the plaintiffs their costs of action.

DATED at Albuquerque, New Mexico, this 15th day of November, 1989.

Nov. 15, 1989 Jesse Casaus
Clerk

/s/Cecilia M. Reyes
(By) Deputy Clerk

APPENDIX F

UNITED STATES DISTRICT COURT
SANTA FE, NEW MEXICO
APR 4 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TERESA GARCIA, et al.,

Plaintiffs, No. CIV 83-0919C

vs.

THERESA MIERA, et al.,

Defendants.

MEMORANDUM OPINION

This case is before the Court on Defendants' Motion for Summary Judgment. The Court has considered carefully all of the arguments advanced by the parties, together with the supporting documentation and legal authority, and concludes that the motion should be granted.

Background.

The Plaintiff is an eleven year old girl who attended Penasco Elementary

School in Penasco, New Mexico in 1982 and 1983. Defendant Theresa Miera was the Principal of Penasco Elementary School during this time. Defendants J. D. Sanchez and Judi Mestas were teachers at the school. Defendant Edward Leyba was a school administrator. Defendant Felix Duran was Superintendent of the Penasco School District.

The Plaintiff sued for damages resulting from spankings she received at school on two separate occasions. She alleges that on February 10, 1982, Defendant Miera called her to the Principal's office for disciplinary reasons. Defendant Sanchez then held the Plaintiff up in the air so that her body hung upside down while Miera paddled the Plaintiff with a wooden paddle. This paddling caused

issue was not clearly established at the time the Plaintiff was paddled in the Penasco Elementary School.[3] Accordingly, under the immunity standard of Harlow v. Fitzgerald, 457 U.S. 800 (1982), all the Defendants are entitled to summary judgment on the Plaintiff's substantive due process claim.[4]

---

3 Indeed, earlier in this case the Court certified for interlocutory appeal the issue of the viability of Plaintiff's substantive due process claim, citing "substantial ground for difference of opinion." Order of Sept. 5, 1984. The Tenth Circuit declined to accept the interlocutory appeal.

4 The Plaintiff argues that her allegations of malice should defeat the good faith immunity defense, citing Harlow, 457 U.S. at 817. This argument is unpersuasive for two reasons. First, malice would be an essential element of the substantive due process claim, as defined by Hall v. Tawney, 621 F.2d at 613. Under the Plaintiff's reasoning, the immunity defense could never apply to this type of claim. Second, and perhaps more importantly, the Supreme Court in Harlow expressly rejected the subjective

Procedural Due Process

The starting point for analysis of a procedural due process claim in the context of school discipline is the Supreme Court's decision in Ingraham v. Wright, 430 U.S. 651 (1977). The Court in Ingraham expressly stated that "corporal punishment in public schools implicates a constitutionally protected liberty interest, but we hold that the traditional common-law remedies are fully adequate to afford due process." Id. at 672. The remedies on which the Court relied were the state of Florida's tort

---

element of the good faith immunity defense, due to the "substantial costs" of the subjective inquiry. 457 U.S. at 816-17. The defense now is based on the "objective reasonableness of an official's conduct, as measured by reference to clearly established law." Id. at 818.

and criminal provisions. The Defendants here argue that New Mexico also has adequate common-law remedies to redress this alleged violation. Alternatively, the Defendants argue that they are entitled to a good faith immunity defense on this claim, and that the facts of this case do not rise to a procedural due process violation. The Court agrees with the Defendants' arguments.

The Supreme Court in Ingraham concluded that given Florida's common-law safeguards against abuse, "the Due Process Clause does not require notice and a hearing prior to the imposition of corporal punishment in the public schools." 430 U.S. at 682. Instead, the Court ruled that "the Fourteenth Amendment's requirement of procedural due process is satisfied by Florida's

preservation of common-law constraints and remedies." Id. at 683. In Florida, school authorities who inflicted excessive punishment could be held liable in damages and, if they acted with malice, subjected to criminal penalties. Id. at 677. These post-deprivation remedies provide restraint on school authorities who might otherwise exceed their common-law privilege to use reasonable corporal punishment. See id. at 674. As the Court stated:

> In those cases where severe punishment is contemplated, the available civil and criminal sanctions for abuse -- considered in light of the openness of the school environment -- afford significant protection against unjustified corporal punishment.... Teachers and school authorities are unlikely to inflict corporal punishment unnecessarily or excessively when a possible consequence of doing so is the institution of civil or criminal proceedings against them.

Id. at 678.

In this case, the Plaintiff and the Defendants differ sharply over whether New Mexico has post-deprivation remedies which are adequate to redress a violation of a student's liberty interest. The Defendants cite to this Court's opinion in Willcox v. Salazar, No. 81-1051-C (D.N.M. Mar. 11, 1982) for the proposition that New Mexico does have adequate post-deprivation remedies. In Willcox the plaintiff alleged a procedural due process violation arising from a school paddling. The court granted the Defendants summary judgment on this count for the following reasons:

> New Mexico has, just as Florida did in Ingraham, common law tort remedies and criminal penalties covering situations where school children may be abused by school personnel. Apart from the tort actions for negligence, assault and

> battery, New Mexico criminal statutes Sections 30-3-1, 30-3-4, 30-3-5, and 30-6-1, N.M.S.A. 1978 set forth criminal sanctions for the physical abuse of children. Additionally, the New Mexico courts have held that failure to judiciously administer corporal punishment can be grounds for a teacher's termination as it constitutes an unsatisfactory work performance under the teacher's employment contract. Morgan v. New Mexico State Board of Education, 83 N.M. 106 (Ct. App. 1971).
>
> Since New Mexico has sufficient common law and criminal law remedies to control excessive corporal punishment of public school students by teachers, I conclude, based on the holding in Ingraham, that these traditional common law remedies are fully adequate to afford due process. Ingraham v. Wright, supra, at 672.

Id., slip op. at 3-4.

Nonetheless, an argument could be made that the New Mexico Tort Claims Act bars a state tort remedy by cloaking school officials with sovereign immunity. In Garcia v. Albuquerque Public Schools

Board, 95 N.M. 391 (Ct. App. 1980), a student who was struck by his public school teacher sued the school board and the teacher. The district court dismissed the complaint because the defendants had immunity under the Tort Claims Act. The Court of Appeals affirmed. It would appear, therefore, that New Mexico may not provide a tort remedy against excessive corporal punishment.

This Court did not consider the Garcia case when it decided Willcox. Garcia was not cited to the Court by the parties in Willcox, and upon reflection the Court is not convinced that Garcia would bar a student's tort remedy. The sole basis for the plaintiffs' appeal in Garcia was that the Tort Claims Act was unconstitutional. The three-judge panel

disagreed in its affirmance of the district court's dismissal. Judge Lopez authored the opinion finding the Act constitutional. Judge Sutin concurred specially, agreeing that the Act is constitutional but pointing out that the plaintiffs had stated a claim under the Act. The Act grants immunity, unless expressly waived, for any tort liability incurred while a public employee is acting "within the scope of duty." N.M.Stat.Ann. Section 41-4-4(A) (1982 Repl. Pamp.). "Scope of duties" means "performing any duties which a public employee is requested, required or authorized to perform." N.M.Stat.Ann. Section 41-4-3(F) (1984 Cum.Supp.). According to Judge Sutin, the defendant teacher was not acting within the scope of his duties when he allegedly

maliciously, willfully or negligently hit the plaintiff. The third judge on the Garcia panel, Judge (now Justice) Walters dissented, finding the Tort Claims Act unconstitutional.

The Garcia case obviously does not provide a clear precedent for the conclusion that students have no tort remedy against public school teachers who inflict excessive corporal punishment. Two of the judges in Garcia would have provided the plaintiff a remedy, finding the teacher to be without sovereign immunity either because he acted outside of the scope of his duties, or because the Tort Claims Act was unconstitutional. Based on this Court's prior decision in Willcox, and on the uncertainty of the Court of Appeals' decision in Garcia, the Court concludes that New Mexico does

provide adequate common-law remedies to afford the Plaintiff procedural due process. Furthermore, even if the Tort Claims Act does bar the Plaintiff's tort remedy, the state's criminal sanctions for the physical abuse of children may in themselves provide adequate procedural due process protection. See Ingraham v. Wright, 430 U.S. 651, 678 (1977) (deterrence based on civil or criminal proceedings).

Even if New Mexico's common-law remedies are not adequate under the Supreme Court's analysis in Ingraham v. Wright, the Court also concludes that the Defendants are entitled to the good faith immunity defense on this claim. The law on this issue was not clearly established at the time the Plaintiff was paddled. On its face, Garcia seems to indicate

that New Mexico would not provide adequate post-deprivation remedies for a procedural due process violation. Yet, this Court in Willcox held that New Mexico's remedies were adequate. The Defendants in this case could not reasonably have known that New Mexico's remedies were inadequate and that they had to provide pre-punishment procedural due process. Accordingly, the Defendants are shielded from liability on this claim based on good faith immunity.

Finally, even if New Mexico's post-deprivation remedies were inadequate, and even if the Defendants were not entitled to the good faith immunity defense, the Court concludes that the facts of this case do not rise to a procedural due process violation. Defendant Miera, the school Principal, afforded the Plaintiff

sufficient due process before making the decision to paddle the Plaintiff. Based on the uncontroverted facts, the Plaintiff has failed to make out a

APPENDIX G

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FILED
UNITED STATES DISTRICT COURT,
ALBUQUERQUE, NEW MEXICO
JUN 03 1985
ENTERED ON DOCKET
JUN 3 1985

BILLY MC GINNIS, a minor by his next friends and parents, BILL and BARBARA MC GINNIS,

Plaintiffs,

v.

HILLARD COCHRAN, individually and in his official capacity as a Carlsbad School District Teacher,

Defendant.

No. Civil 85-261-M

MEMORANDUM OPINION AND ORDER

THIS MATTER came on for consideration on defendant's motion to dismiss. Having considered the motion, the response, and the briefs of counsel, I find that the motion is not well taken and it will be denied.

Plaintiff Billy McGinnis, (Billy) was at the time of the incident that gave

rise to this lawsuit an eleven-year old special education student at Alta Vista, a public Middle School in Carlsbad, New Mexico. Plaintiffs Bill and Barbara McGinnis are the parents of Billy McGinnis. Defendant Hillard Cochran is a former chorus teacher at the Alta Vista Middle School. The plaintiffs bring this suit pursuant to 42 U.S.C. Section 1983 with

Defendant moves to dismiss plaintiffs' procedural due process claim relying on Ingraham v. Wright, supra. "In those cases where severe punishment is contemplated, the available civil and criminal sanctions for abuse--considered in the light of the openness of the school environment--afford significant protection against unjustified corporal punishment. Teachers and school authorities are unlikely to inflict corporal punishment unnecessarily or excessively when a possible consequence of doing so is the institution of civil or criminal proceedings against the." Id. at 678. In holding that the traditional common law remedies were adequate to afford due process, the Supreme Court in Ingraham relied on the State of Florida's tort and criminal law

provisions. The defendant argues that New Mexico also has adequate remedies to redress this alleged violation in the N.M.Stat.Ann. Section 30-3-1, 30-3-4, 30-3-5, and 30-6-1 (Rep.Pam.1984).

It is not clear that the law of New Mexico is analogous to the Florida law on which the Ingraham decision was based. In Garcia v. Albuquerque Public School Board, 95 N.M. 391 (Ct.App.1980), a student who was struck by his public school teacher sued the school board and the teacher. The district court dismissed the complaint because defendants had immunity under the Tort Claims Act. The Court of Appeals affirmed.

The sole basis for the plaintiffs' appeal in Garcia was that the Tort Claims Act was unconstitutional. That argument

was rejected by a divided Court of Appeals. The plaintiffs agree that the New Mexico Tort Claims Act Section 41-4-1 et seq. (1978) apparently gives the defendant governmental immunity from the state claims of their complaint. However, the plaintiffs argue that the decision in Garcia is incorrect.

A state may consent to be sued in federal court. However, the state's consent must be unequivocally expressed. Pennhurst State School & Hospital v. Halderman, 79 L.Ed.2d 67 (1984). No such unequivocal consent to be sued has been expressed by the state. It appears that New Mexico does not provide any tort remedy against public school teachers who inflict excessive punishment on their students.

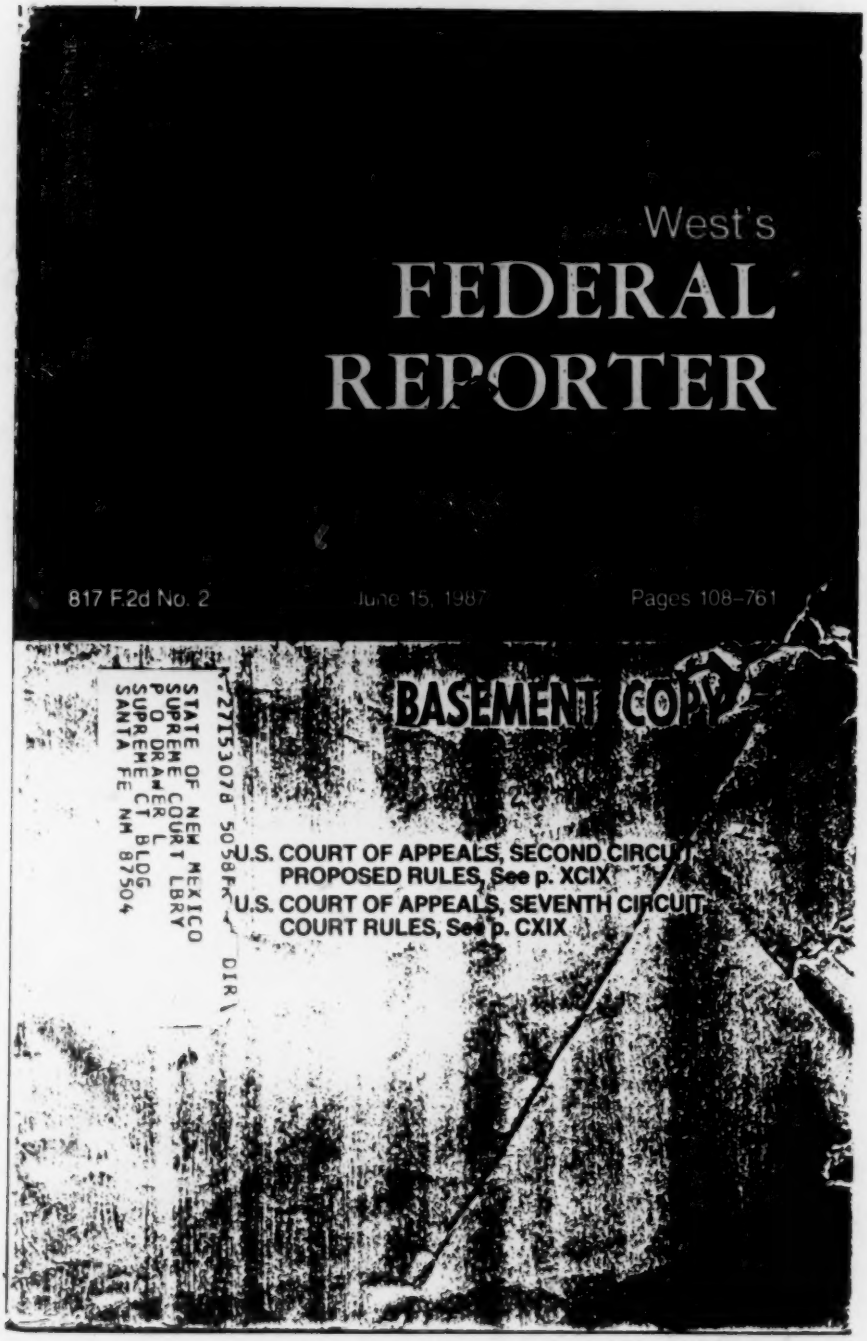
Billy McGinnis was afforded no

procedural due process at any time. There was no compliance with the school's regulations concerning punishment, as shown by the administration's suspension of the defendant as a result of this incident. Unlike Ingraham, in which the Supreme Court held that there was no Section 1983 procedural due process action because of the availability of a state tort action, there appears to be no state tort action in this state and this lawsuit may constitute the plaintiffs' only procedural due process. Defendant's motion to dismiss the procedural due process claim will therefore be denied.

STATE CLAIMS

The defendant moves to dismiss the state claims contending that he has immunity under the New Mexico Tort.

APPENDIX H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June 15, 1987
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U.S. COURT OF APPEALS, SECOND CIRCUIT
PROPOSED RULES, See p. XCIX
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STATE OF NEW MEXICO
SUPREME COURT LBRY
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SUPREME CT BLDG
SANTA FE NM 87504

No. 90-1304

Supreme Court, U.S.
FILED
MAR 21 1991
OFFICE OF THE CLERK

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1990

ORLANDO CORIZ, JR., by and through
next friends ORLANDO CORIZ
and BERNICE D. CORIZ,

Petitioners,

v.

ARTHUR MARTINEZ and CARLOS GUILLEN,
in their individual capacities only,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Daniel H. Friedman
Simons, Cuddy & Friedman
Post Office Box 5738
Santa Fe, New Mexico 87502
(505) 988-4476

Counsel for Respondents

March 21, 1991

BEST AVAILABLE COPY

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Garcia by Garcia v. Miera, 817 F.2d 650 (10th Cir. 1987), cert. denied, 485 U.S. 959 (1988) 2

Ingraham v. Wright, 430 U.S. 651 (1977). 1

Mitchell v. Forsyth, 472 U.S. 511 (1985). 4

STATUTES:

New Mexico Tort Claims Act, §§ 41-4-1, et seq., N.M.S.A. (1978). 3

REASONS FOR DENYING THE WRIT

THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUITS NOR RAISE AN IMPORTANT FEDERAL QUESTION

The decision below constitutes a narrow and unimpeachable application of qualified immunity doctrine which hardly merits review by this Court. The labored questions purportedly presented for review (Pet. i-vi) cannot mask the absence of either a conflict among the federal courts or an important federal question demanding resolution.

The qualified immunity analysis in both the district court and the Court of Appeals was straightforward. Petitioner, a public high school student, sought damages for denial of procedural due process arising from an alleged assault by a student aide in the course of discipline (Pet. A-2). If New Mexico afforded adequate post-deprivation remedies, they would satisfy due process requirements, Ingraham v. Wright, 430 U.S. 651, 682 (1977). If adequate post-deprivation remedies were not available, Petitioner's rights

would have been violated absent pre-deprivation process.

At the time of the incident complained of, an objectively reasonable school official could not have determined with certainty whether New Mexico did or did not provide adequate post-deprivation remedies. Opinions of two judges of the United States District Court for the District of New Mexico directly conflicted on this issue, Garcia by Garcia v. Miera, 817 F.2d 650, 656 (10th Cir. 1987), cert. denied, 485 U.S. 959 (1988). The Court of Appeals for the Tenth Circuit had previously acknowledged the split of decisions while taking no action to resolve it, id. Based on that conflict, neither the district court nor the Court of Appeals had any difficulty in awarding qualified immunity to the Defendants here (Pet. C-5-6, A-6).

The controlling New Mexico state court decision delineating the available state remedies

was equally unclear. In Garcia v. Albuquerque Public Schools Board of Education, 95 N.M. 391, 622 P.2d 699 (Ct. App. 1980), cert. quashed, 95 N.M. 426, 622 P.2d 1046 (1981), the New Mexico Court of Appeals affirmed the district court's dismissal of a complaint by a student allegedly hit by his public school teacher because the defendants had immunity under the New Mexico Tort Claims Act, §§ 41-4-1, et seq., N.M.S.A. (1978). Nevertheless, the New Mexico Court of Appeals modified the lower court's order of dismissal to make it "without prejudice," id., at 385, based on two judges' recognition that a cause of action for excessive punishment was still viable notwithstanding the ostensible bar of sovereign immunity.[1]

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[1]Petitioner's citation of the later Gallegos v. State, 107 N.M. 349, 352, 758 P.2d 299 (Ct. App. 1987), cert. quashed, 107 N.M. 314, 757 P.2d 370 (1988), as precluding evasion of the bar of sovereign immunity (Pet. 6, n.1) is unavailing. Even according that case the interpretation claimed by Petitioner, it was decided after the incident

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Uncertainty in the law at the time an official acts is determinative of qualified immunity, Mitchell v. Forsyth, 472 U.S. 511 (1985). The "decisive fact" is not that the official's position on the law "turned out to be incorrect, but that the question was open at the time he acted", id., at 535. To deny qualified immunity because an official "gambled and lost on the resolution of this open question departs from the principles of Harlow. Such hindsight-based reasoning on immunity issues is precisely what Harlow rejected," id. Officials "are not subject to suit when such questions are resolved against them only after they have acted," id.

Apart from the obvious correctness of the decision below, the Petition demonstrates neither a conflict with decisions in other federal courts

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(cont. from preceding page)

complained of here. Furthermore, the conflict among the federal courts, unresolved by the Court of Appeals for the Tenth Circuit, would still mandate qualified immunity.

nor a misapplication of qualified immunity concepts. Petitioner makes a tortured argument that the Court of Appeals for the Tenth Circuit failed to complete its analysis by not determining whether, under the particular facts alleged, a violation of clearly established law occurred. (Pet. 16-17). Petitioner overlooks the fact that the direct conflict among subordinate courts, which the Court of Appeals had not previously resolved, precluded a finding that the inadequacy of New Mexico's remedies was clearly established under **any** conceivable set of facts. Petitioner's inclusion of excerpts from the two earlier district court decisions (Pet. Apps. F, G) amply demonstrates that precisely the same legal issue as in the present case had been addressed and decided in diametrically opposing ways. It is hard to imagine a purer "issue of law" mandating qualified immunity, independent of factual context, Mitchell v. Forsyth, supra, at 530.

Therefore, this case does not require resolution of the supposed conflict among the appellate circuits as to the necessary level of factual correspondence between earlier precedents and the case under consideration (Pet. 17). For the same reason, this case is not a fit vehicle for broadly specifying the types of decisional conflicts justifying qualified immunity (Pet. 20-22). There could be no more formidable conflict than one between courts in the very district having jurisdiction over the litigants, a conflict acknowledged and unresolved by the governing circuit court. Petitioner cites no instance in which such a conflict has been held insufficient for an award of qualified immunity.

Petitioner's argument that unreported cases should not be the basis for a determination of clearly established law (Pet. 23), ignores the fact that the Court of Appeals in a **published** decision acknowledged the conflict among

subordinate courts and declined to resolve it, Garcia by Garcia v. Miera, supra. Far from basing a determination of clearly established law on unreported cases, the Court of Appeals determined that the law was **not** clearly established.

Finally, Petitioner makes two diffuse arguments (Pet. 23-28), apparently requesting a determination of the adequacy of New Mexico's tort remedies for excessive punishment in light of the New Mexico Tort Claims Act, supra, and asserting that the supposed bar it imposes is a denial of equal protection. The equal protection argument was not raised below. An after-the-fact determination of law (e.g., whether the New Mexico statute does or does not provide a tort remedy) does not preclude an award of qualified immunity, Mitchell v. Forsyth, supra, at 535. Petitioner could easily have secured this determination by seeking certification at an earlier stage to the New Mexico Supreme Court (Pet. A-7, n.3), which it

declined to do. Petitioner has failed to demonstrate why the time of this Court is required to resolve this issue.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.[2]

Respectfully submitted,

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[2]Pursuant to U.S.Sup.Ct.Rule 15.1, Respondents point out three instances in which the Petitioner has inserted argumentative material in brackets in a quotation (Pet. iii, 5-6, 17).